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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 BRETT W. BARKLEY,

Civil No. 05-6094-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15
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17 Eugene, Oregon 97401
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25 AIKEN, Judge:

26 Claimant, Brett Barkley, brings this action pursuant to the
27 Social Security Act (the Act), 42 U.S.C. §§ 405(g), 1383(c) (3), to
28

1 obtain judicial review of a final decision of the Commissioner.
2 The Commissioner denied plaintiff's application for Disability
3 Insurance Benefits (DIB) under Title II of the Social Security
4 Act, and for Supplemental Security Income (SSI) disability
5 benefits under Title XVI of the Act. Id. For the reasons set
6 forth below, the Commissioner's decision is affirmed and this
7 case is dismissed.

8 **PROCEDURAL BACKGROUND**

9 Plaintiff protectively filed his application for DIB and
10 SSI benefits on January 8, 2002. Tr. 28, 81-83, 627-30. He
11 alleged an inability to work beginning May 1, 2000, due to severe
12 chronic neck and hip pain; absence of vision in his left eye;
13 severe depression and anxiety; and complete memory loss and
14 disorientation that rendered him unable to lift, drive "semis,"
15 interact personally and complete even simple tasks. Tr. 103. His
16 applications were denied initially, tr. 63-74, and upon
17 reconsideration. Tr. 631-40. On May 20, 2004, after a hearing,
18 the Administrative Law Judge (ALJ) ruled that plaintiff was not
19 disabled. Tr. 25-38. The Appeals Council, after considering
20 additional records presented by plaintiff, found that the new
21 evidence did not provide a basis for overturning the ALJ's
22 decision, and therefore, denied plaintiff's request for review.
23 Tr. 11-13, 641-708. The ALJ's decision thus became the final
24 agency decision. See 20 C.F.R. §§ 404.981, 416.1481, 422.210
25 (2005).

26 **STATEMENT OF THE FACTS**

27 Born in 1968, plaintiff was 32 years old at his alleged
28 onset date and 36 years old at the time of the hearing. Tr. 81,

1 714. Plaintiff has a high school education including a GED, some
2 college, and graduated from truck driving school. Tr. 109.
3 Plaintiff has past work experience as a truck driver, chef,
4 delivery driver, deck hand, fish plant worker, grinder and carpet
5 cleaner. Tr. 29.

6 After the ALJ's decision, on July 27, 2004, plaintiff
7 submitted a two-page, "check the box" type report from Dr.
8 William Moshofsky, dated June 17, 2004; and 2004 records from
9 Sacred Heart Medical Center to the Appeals Council for review as
10 additional evidence. Tr. 641-42, 643-708.

11 **STANDARD OF REVIEW**

12 This court must affirm the Secretary's decision if it is
13 based on proper legal standards and the findings are supported by
14 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
15 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
16 mere scintilla. It means such relevant evidence as a reasonable
17 mind might accept as adequate to support a conclusion."
18 Richardson v. Perales, 402 U.S. 389, 401 (1971)(quoting
19 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
20 The court must weigh "both the evidence that supports and
21 detracts from the Secretary's conclusions." Martinez v. Heckler,
22 807 F.2d 771, 772 (9th Cir. 1986).

23 The initial burden of proof rests upon the claimant to
24 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
25 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
26 an "inability to engage in any substantial gainful activity by
27 reason of any medically determinable physical or mental
28 impairment which can be expected . . . to last for a continuous

1 period of not less than 12 months. . . ." 42 U.S.C.

2 § 423(d)(1)(A).

3 The Secretary has established a five-step sequential
4 process for determining whether a person is disabled. Bowen v.
5 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
6 416.920. First the Secretary determines whether a claimant is
7 engaged in "substantial gainful activity." If so, the claimant
8 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
9 §§ 404.1520(b), 416.920(b).

10 In step two the Secretary determines whether the claimant
11 has a "medically severe impairment or combination of
12 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
13 §§ 404.1520(c), 416.920(c). If not, the claimant is not
14 disabled.

15 In step three the Secretary determines whether the
16 impairment meets or equals "one of a number of listed impairments
17 that the Secretary acknowledges are so severe as to preclude
18 substantial gainful activity." Id.; see 20 C.F.R.
19 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
20 presumed disabled; if not, the Secretary proceeds to step four.
21 Yuckert, 482 U.S. at 141.

22 In step four the Secretary determines whether the claimant
23 can still perform "past relevant work." 20 C.F.R.
24 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
25 disabled. If she cannot perform past relevant work, the burden
26 shifts to the Secretary. In step five, the Secretary must
27 establish that the claimant can perform other work. Yuckert, 482
28 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &

1 (f). If the Secretary meets this burden and proves that the
2 claimant is able to perform other work which exists in the
3 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
4 416.966.

5 **DISCUSSION**

6 Based on the 5-Step Sequential Process outlined above, the
7 ALJ found at Step One that plaintiff was not engaged in
8 "substantial gainful activity" since his alleged onset date of
9 disability. At Step Two, the ALJ found that plaintiff had
10 "severe" impairments. Findings by the ALJ at Steps One and Two
11 are not in dispute. At Step Three, the ALJ found that these
12 medically determinable impairments do not meet or equal one of
13 the listed impairments. This Finding is in dispute, as is the
14 ALJ's determination of plaintiff's residual functional capacity.
15 See 20 C.F.R. §§ 404.1520(e), 404.1545, 416.920(e), 416.945. At
16 Step Four, the ALJ found that plaintiff was not able to perform
17 past relevant work, however, the ALJ determined that plaintiff
18 retained the residual functional capacity to perform a range of
19 light exertion work (which includes the ability to perform
20 sedentary work); but could not perform "detailed and complex jobs
21 or address public service." Tr. 35. This Finding is in dispute.
22 Finally, at Step Five, based on the testimony of the vocational
23 expert, the ALJ held that plaintiff was capable of performing
24 other work that exists in the national economy. Tr. 37-38. This
25 Finding is also in dispute.

26 Plaintiff alleges only that the ALJ erred by failing to
27 reject the opinion of plaintiff's treating physician, Dr.
28 Moshofsky. Dr. Moshofsky's opinion was contained in a "check-the-

1 box" letter dated June 17, 2004, submitted by plaintiff to the
2 Appeals Council after the ALJ's decision. Tr. 641-42. Plaintiff
3 also submitted records dated 2004 from the Sacred Heart Medical
4 Center. Tr. 643-708. The Appeals Council reviewed the record
5 including the additional evidence submitted by plaintiff and
6 concluded that "this information does not provide a basis for
7 changing the Administrative Law Judge's decision." Tr. 11-12.
8 I agree.

9 First, I agree with plaintiff that the new evidence
10 submitted to the Appeals Council was made part of the
11 administrative record and it is therefore proper for this court
12 to consider the substance of that evidence. Dr. Moshofsky's
13 letter dated June 17, 2004, submitted to the Appeals Council,
14 stated in relevant part:

15 1. What are the diagnoses?
16 Depression. Aneurysm repair, neck injury, tobacco
dependent.

17 2. What are the objective medical findings upon
18 which the diagnoses are based?
x-rays, specialty evaluations.

19 3. What are the symptoms?
20 chronic pain, neck and head.

21 4. Are the conditions capable of causing these
22 symptoms?
Yes.

23 5. In your opinion based on the above definition
24 [of sedentary work], would [plaintiff] be
capable of a full range of sedentary work?

25 Yes.
Comments: He is only intermittently functional
from an emotional standpoint.

26 6. Is [plaintiff] unable to sustain work activity
27 on a full-time basis in the sedentary category
due to the exacerbation of his medical condition?
28 Unable to sustain sedentary work.

1 Tr. 641-42.

2 I agree with the Appeals Council and do not find that this
3 "check-the-box" form "provides a basis for changing the
4 Administrative Law Judge's decision." Tr. 12. Dr. Moshofsky
5 reported symptoms, however, he failed to set out any objective
6 findings in his report instead referring only generally to "x-
7 rays and specialty evaluations" in support of the diagnoses
8 therein. Further, Dr. Moshofsky opined that plaintiff would, in
9 fact, be capable of a full range of sedentary work; next that
10 plaintiff was only intermittently functional from an emotional
11 standpoint; and finally, that he would be unable to sustain
12 sedentary work. I find that this report is not internally
13 consistent. I also find that it is not based on objective
14 findings nor does it cite to any specific "x-ray" evidence or
15 "specialty evaluations" to support the diagnoses (nor has this
16 court been able to locate such in the record). This form does
17 not support findings of greater functional limitations than those
18 assessed by the ALJ for any significant period of time.

19 Regarding the remainder of the new evidence submitted by
20 plaintiff to the Appeals Council, that evidence consists of
21 plaintiff's records from 2004 from Sacred Heart Medical Center.
22 Tr. 643-708. The medical experts in those records consistently
23 opine that plaintiff is malingering, inventing symptoms for
24 secondary gain, and drug seeking. Specifically, the treating
25 physicians at Sacred Heart opined the following: Plaintiff's
26 Diagnosis: "malingering," tr. 657; and again, plaintiff's
27 "Diagnosis: probable malingering," tr. 658. Other physicians
28 noted that plaintiff's "behavior" is "obviously non-physiologic,

1 not neurologic in origin." Tr. 646. Another physician's note
2 reads: "clearly no indication for Internal Medicine involvement
3 in this patient's care whatsoever at this time. I don't believe
4 there is a bonafide neurologic component to anything that is
5 going on here." Tr. 647. Another chart note reads:

6 I did a lab work up here including ordering a
7 toxicology screen because in the past there
8 has been secondary gain to his complaints; either
9 he tries to get admitted for a place to stay
10 or he gets pain medicine. [Plaintiff's] toxicology
11 screen was positive for amphetamines and pot;
12 Because of the patients' persistent symptoms of
13 left-sided weakness, although somewhat
14 inconsistent in exact presentation, and somewhat
15 suspicious as far as whether this is malingering
16 or not, he does have a history of a prior aneurysm
17 and I went ahead and got a CT of his head which
18 came back negative. At that point, I got his
19 toxicology screen back and confronted him in the
20 fact that I thought he was malingering and at
21 that point he got quite agitated and distracted
22 such that his left-sided weakness completely
23 resolved. He got mad and demanded a repeat
24 toxicology screen saying that [the first screen]
25 was erroneous. I agreed to do this but pointed
26 out that he indeed was moving his left side at
27 that point and that any neurological
28 deficits were resolved. I went ahead and
discharged him. . . indeed, his repeat urine
screen, with a new specimen, was also
positive for amphetamines.

Tr. 650.

Finally, another chart note indicates: "Diagnosis on
Admission: 1. Adjustment disorder with depressed mood, secondary
to no housing; 2. marijuana and opioid [sic] dependence; and 3.
Most likely malingered psychotic and delusional symptoms for the
purpose of secondary gain." Tr. 663.

The examples cited above by no means exhaust the evidence
contained in the 64 pages of records detailing various
physician's determinations regarding plaintiff's malingering and

1 substance abuse. Moreover, I note that plaintiff fails to
2 address the issues of malingering and substance abuse in either
3 his initial Memorandum or Reply Memorandum. These treatment
4 records weigh against plaintiff's allegations of disability and
5 far outweigh Dr. Moshofsky's "check-the-box" opinion, submitted
6 at the same time. Finally, I find that the record before the ALJ
7 was replete with evidence relating to plaintiff's emotional
8 and/or mental health. The ALJ specifically and thoroughly
9 considered voluminous records relating to plaintiff's mental
10 health. Tr. 25-38. Moreover, the ALJ requested the testimony
11 and expertise of licensed clinical psychologist at the hearing.
12 Tr. 709-10, 762-68.

13 I find that the ALJ adequately considered and properly
14 rejected or accepted all relevant evidence, including plaintiff's
15 testimony (which he found not credible) and the medical evidence.
16 Tr. 28-38. This court considered as part of the administrative
17 record plaintiff's additional medical evidence that was initially
18 submitted to and considered by the Appeals Council. I find no
19 basis to overturn the ALJ's decision and find the decision is
20 based on proper legal standards and the findings are supported by
21 substantial evidence in the record.

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1 **CONCLUSION**

2 The Commissioner's decision is based on substantial
3 evidence, and is therefore, affirmed. This case is dismissed.
4 IT IS SO ORDERED.

5 Dated this 14 day of February 2006.

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9 /s/ Ann Aiken
10 Ann Aiken
United States District Judge
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